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IN THE

Supreme Court of the United States

October Term, 1964

No. 2244

JOHN A. GAUTIER, Tax Assessor,
EARNEST OVERSTREET, Tax Collector,
and RAY E. GREEN, Comptroller of the
State of Florida,

Petitioners,

v.

FLORIDA GREENHEART CORPORATION,
a Florida corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	10

Appendix

Opinion and Judgement of the Supreme Court of Florida	A. 1
Order of the Supreme Court of Florida Denying Petition for Rehearing	A. 15
Opinion and Final Decree of the Circuit Court of Dade County, Florida	A. 16
Opinion and Order of the Circuit Court of Dade County, Florida Denying Summary Decree	A. 20
Conflicting Opinion and Judgment of the District Court of Appeal, Second District Division 2, California	A. 28

CASES CITED

	Page
Brown v. *State of Maryland*, 12 Wheat. 419, 6 L.Ed. 678	8
Florida Greenheart Corp. v. *Tax Assessor, et al.*, 20 Fla.Supp. 115	3
Florida Greenheart Corporation v. *Gautier*, Fla. 1965, 172 So.2d 589	2
Hinson v. *Lott*, *8 Wall.* 148, 75 U.S. 148, 19 L.Ed. 387	9
F. May & Company v. *City of New Orleans*, 178 U.S. 496 20 S.Ct. 976, 44 L.Ed. 1165	9
Mexican Petroleum Corp. v. *City of South Portland*, 121 Me. 128, 115 A. 900	7
Overstreet v. *Cooper*, Fla. 1961, 134 So.2d 225	8
E. J. Stanton & Sons v. *Los Angeles County*, 78 Cal. App.2d 181, 177 P.2d 804, certiorari denied 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352	7
Tres Ritos Ranch Co. v. *Abbott*, 44 N.M. 556, 105 P.2d 1070	10
Youngstown Sheet and Tube Co. v. *Bowers*, 385 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383	10

CONSTITUTIONAL PROVISION

	Page
Article I, Section 10, Clause 2, of the Constitution of the United States	3

STATUTE CITED

Title 28, U.S.C.A., Section 1527 (3)	2

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above styled cause on March 3, 1965 and there entitled *Florida Greenheart Corporation* v. *John A. Gautier, Tax Assessor, et al.*, petition for rehearing denied on April 5, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Dade County, Florida and its order on motion for summary decree, dated July 26, 1962, are reported in 20 Fla.Supp. 115 and are printed in the appendix at pages A 20-27, infra. The opinion of the Circuit Court of Dade County, Florida and its final decree, dated October 3, 1963, have not been reported and are printed in the appendix at pages A 16-20, infra. The opinion of the Supreme Court of Florida, dated March 3, 1965 and order denying rehearing, dated April 5, 1965 are reported in 172 So.2d 589 and printed in the appendix at pages A 1-15, infra.

JURISDICTION

The judgment of the Supreme Court of Florida was rendered on March 3, 1965; rehearing was denied on April 5, 1965. The judgment reversed the final decree of the Circuit Court of Dade County, Florida which dismissed the respondent's complaint because the respondent had "not demonstrated an immunity from taxation pursuant to Article I, Section 10, Clause 2, of the Constitution of the United States, as alleged." Jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1257(3).

QUESTION PRESENTED

Where logs and timbers are imported loose aboard ship, then sorted and stacked on an open yard as to lengths with those previously imported and unsold and then are sold piece-meal, do they lose their character as imports and their immunity from local taxation granted by Article I, Section 10, Clause 2, of the Constitution of the United States?

STATUTES INVOLVED

There are no statutes involved, only Article I, Section 10, Clause 2, of the Constitution, the pertinent portion reading as follows:

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports . . . , except what may be absolutely necessary for executing its inspection laws . . ."

STATEMENT

On September 1, 1960 the respondent filed its complaint in the Circuit Court of Dade County, Florida against the petitioners, alleging that it was in the business of importing demerara greenheart for sale. It was further alleged the tax assessor levied a tax on the imports for the years 1959 and 1960 whereas such property was immune from local taxation pursuant to the import clause of the Constitution of the United States (R. 79-84).

The petitioners filed an answer denying the material allegations of the complaint, and specifically denying that the import clause was applicable (R. 87-89). Affidavits were filed and the petitioners moved for a summary final decree which was denied by the chancellor; *Florida Greenheart Corp.* v. *Tax Assessor, et al.*, 20 Fla. Supp. 115, printed in the appendix at pages A 20-27, infra.

The pertinent testimony was the deposition of the respondent's past-president (R. 112-141). This proved that the respondent was an importer of a wood product generally used in construction of docks. It imported by ship

greenheart pilings (logs) and "sawn" timber (lumber) from British Guiana. Such were sawn to lengths and size, and marked in that South American country and then loaded on shipboard without being packaged, crated, wrapped or bundled.

Sixty or seventy per cent of the importer's requests for shipment from British Guiana was based upon anticipated local orders and the remaining portion was determined from local orders already received; however, this was not the sole criteria in estimating the amount of greenheart to be imported. The importer also took into consideration what remained unsold on its sales yard and also estimated the number of pilings that might be rejected by prospective purchasers because of splitting.

When a shipment arrived at Miami the greenheart was placed on the importer's open sales yard. The lumber and pilings were stacked as to size and sometimes as to anticipated orders, and sometimes they were not separated as to orders.

The importer usually ordered more than was necessary. Sometimes the pieces would be split and would have to be sold to the consumer for a price less than the full length price; and sometimes the importer would cut off the split portion at the request of its purchaser. Sometimes the importer's purchaser would obtain delivery at the yard and at other times the importer would make delivery.

The analysis of the importer's running inventory and sales (R. 147-165) was introduced into evidence. The same clearly shows that the greenheart pilings and sawn tim-

bers were continuously sold piece-meal to various local purchasers; that, as the amount on the sales yard was depleted, the same was replenished by a new shipment. For example of the piece-meal sale the importer admits that it sold piling 1, 2, 3, 4 pieces and so on at a time to many different customers (R. 153-157). During the year 1959 the greatest number sold to any one customer at one time was forty-three pilings. Such piece-meal sales to various customers of the sawn timbers is also undisputed (R. 162-164).

By final decree dismissing the respondent's complaint with prejudice, the trial court reasoned, inter alia:

> "It is clear that at least some of the 'greenheart' was 'put to the use for which it was imported' (see *Youngstown Sheet and Tube Co. v. Bowers*, 3 L.Ed.2d 470, and *Hooven & A. Co. v. Evatt*, 324 U.S. at p. 657) 'by having been offered for sale among the community at large' (see *Hinson v. Lott*, 19 L.Ed. 387). It is also clear that there was a 'breaking of bulk' (see *Stanton and Sons v. Los Angeles County*, 177 P. 2d 804, and 58 Harvard Law Review 858) in at least some of the shipments of 'Greenheart.'
>
> "It is undisputed that some of the 'Greenheart' which is the subject of this levy was stacked in piles according to length (p. 21 of the deposition of J. E. Jacks in evidence), no effort having been made to keep it separated as to unit of transportation or as to anticipated particular sales, and it was offered for sale to the public (pp. 10 and 15 of the Jacks' deposition).

> That portion of the 'Greenheart' so stacked commingled as to shipment and offered for sale to the public had clearly passed that point where prohibition to tax commences. That merchandise had been put to the use for which it was imported."

It then went on to say that if some of the greenheart had not entered the mass of trade, the respondent failed to prove what portion was so immune from taxation, thus it was not entitled to relief.

The same Federal question was again raised in the Supreme Court of Florida by the respondent's assignments of error which stated, inter alia, as follows:

> "4. The Court erred in entering the Final Decree, dated October 3, 1963, and entered in the above cause, and filed on October 7, 1963, and recorded on October 8, 1963 in Chancery Order Book 1712 on page 188, in that said Decree failed to hold that all of the Demerara Greenheart in Plaintiff's possession was immune from taxation, pursuant to Article I, Section 10, Clause 2, of the Constitution of the United States.
>
> "5. The Court erred in entering the Final Decree, dated October 3, 1963, and entered in the above cause, and filed on October 7, 1963, and recorded on October 8, 1963 in Chancery Order Book 1712 on page 188, in that said Decree held that none of the Demerera Greenheart in Plaintiff's possession was immune from taxation, pursuant to Article I, Section 10, Clause 2, of the Constitution of the United States."

The Supreme Court of Florida took jurisdiction because, as stated at the outset of its opinion:

> "This direct appeal from a final decree of the Circuit Court of Dade County comes to us under Article V of the Florida Constitution vesting jurisdiction here to review on appeal any decision of a trial court 'construing a controlling provision of the . . . Federal Constitution.'"

and footnote number 1 says:

> "'The language of the question decree is '. . . that the plaintiff has not demonstrated an immunity from taxation pursuant to Article I, Section 10, Clause 2, of the Constitution of the United States, as alleged, . . .'"

Thereupon the Florida court of last resort "Reversed and remanded for entry of a decree in accordance . . ." with its opinion; i.e., that the greenheart was not in the mass of local trade but immune from local taxation pursuant to the import clause. Nevertheless, Justice Erwin wrote a dissenting opinion in which Justice Roberts concurred.

REASONS FOR GRANTING THE WRIT

1. The decision of the appellate court below in the instant case is in conflict with *Mexican Petroleum Corp* v. *City of South Portland,* 121 Me. 128, 115 A. 900; and it is in direct conflict with the California case of *E. J. Stanton & Sons* v. *Los Angeles County,* 78 Cal.App.2d 181, 177 P.2d 804, certiorari denied 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352. The latter case held that imported unwrapped

lumber and logs of different shipments, although stacked separately in the importer's storage yard, was subject to local taxation upon the sale of one piece; i.e., when the original package, the shipload, was broken. The majority of the Supreme Court of Florida actually recognized this conflict. Their opinion advises that they could not agree with the chancellor's conclusion based upon the *Stanton* case, supra, " . . . even if it were the results reached by the California court, for three reasons . . . ", none of which factually distinguishes the instant case from the California *Stanton* case which is printed in the appendix at pages A 28-44, infra.

2. The case of *Overstreet* v. *Cooper*, Fla. 1961, 134 So.2d 225, relied upon by the Supreme Court of Florida, did not decide that the unbroken packaged imported goods there taxed were not taxable. There the issue raised by motion to dismiss was whether a foreign corporation could maintain the action in the Florida court without qualifying to do business in Florida; i.e., until it was so qualified, it had no right to litigate its claim of illegal taxation. Because such issue was raised by motion to dismiss, the allegation of tax immunity was admitted for the purpose of the motion and not decided by the court. Nevertheless, the *Overstreet* case did quote with approval from *Brown* v. *State of Maryland*, 12 Wheat. 419, 6 L.Ed. 678, and the Florida appellate court's opinion in the instant case is in conflict with that 1827 decision. The conflict is reflected by Justice Marshall's holding that when an importer travels with his goods as an itinerant peddler; i.e., exhibits his goods for piece-meal sale to the public at large, he " . . . has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country . . . lost its distinctive character as an

import, and has become subject to the taxing power of the State." Such was the reasoning of this Court in *Hinson* v. *Lott*, 8 Wall. 148, 75 U.S. 148, 19 L.Ed. 387, when explaining *Brown* v. *State of Maryland*, supra.

In *Hinson* it was pointed out:

> "As soon as they passed out of his hands into use or were offered for sale among the community at large, they would be liable to a tax . . . " (emphasis supplied)

Further, it was emphasized in *F. May & Company* v. *City of New Orleans*, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165, when explaining the *Brown* case as follows:

> " * * * But it was not held that the right to sell was attended with an immunity from all taxation upon the goods as property, after they had ceased to be imports and had become by the acts of the importer a part of the general mass of property in the state. The contrary was adjudged."

In other words, when imported goods are exhibited for piece-meal sale to the community at large, and some sold, they have been so acted upon by the importer that they are at that point in competition with like local articles of commerce which are locally taxed, and are therefore in the mass of trade; but the Supreme Court of Florida ruled otherwise.

3. If the lower appellate court's decision is permitted to stand not only will local competitive building

supply businesses be discriminated against in favor of importers who competitively sell piece-meal their unpackaged imports, but such importers will have a tax advantage over importers of packaged goods who are forced to break the package in order to sell piece-meal. In this regard it is submitted that the so-called original package doctrine is merely an example of acting upon goods to place them in the mass of trade, and that the act of displaying or making imported goods available for piece-meal sale, whether imported in packages or not, places such imports in competition with other local goods offered for piece-meal sale and therefore such imports are in the mass of trade; Cf. *Youngstown Sheet and Tube Co.* v. *Bowers*, 385 U.S. 534, 3 L.Ed.2d 490, 79 S. Ct. 383, and *Tres Ritos Ranch Co.* v. *Abbott*, 44 N.M. 556, 105 P.2d 1070.

4. Further, this Court has not passed directly on the issue here presented, save in its denial of certiorari without opinion, in the *Stanton* case, supra.

CONCLUSION

For the foregoing reasons it is evident that the majority opinion of the Supreme Court of Florida did not follow the weight of authority, conflicts with the reasoning of many decisions of this Court, and directly conflicts with the decision in the California *Stanton* case, supra, all dealing with the import clause of the Constitution of the United States. We therefore submit this case is of such far-reaching importance that it demands the granting of the writ in order to resolve the conflict and resulting

confusion engendered by the Florida decision and the California case.

Respectfully submitted,

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June 5, 1965.